Supreme Court, U.S.
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No. 00-1119

IN THE

Supreme Court of the United States

CRYSEN/MONTENAY ENERGY COMPANY,
Petitioner,

v.

SHELL OIL COMPANY and
SCALLOP PETROLEUM COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, removes from bankruptcy courts the power to stay non-core adversary proceedings and compel arbitration, when any such order will be reviewed *de novo* by the district court before a final order or judgment may be entered.

2. Whether: (i) the rules for conducting an arbitration proceeding; (ii) the procedures for rendering an arbitration award; and (iii) the standard of review of an arbitration award, are different when a bankruptcy court, rather than a district court, is the first court to review the award.

STATEMENT PURSUANT TO RULE 29.6

Shell Oil Company ("Shell") is wholly owned by Shell Petroleum Inc., a Delaware corporation, whose shares are directly or indirectly owned 60 percent by Royal Dutch Petroleum Company, The Hague, The Netherlands, and 40 percent by the Shell Transport and Trading Company, both of which are publicly-owned holding companies. Scallop Petroleum Company ("Scallop") was a division of Scallop Corporation which was a wholly owned subsidiary of Shell Oil Company at the time Scallop Corporation was dissolved in 1987.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions quoted in the Appendix ("Pet. App.") to the Petition for a Writ of Certiorari (the "Petition"), pertinent provisions of 28 U.S.C. § 157(a) and 11 U.S.C. § 105(a) are reproduced in the Appendix to this Brief in Opposition to the Petition.

COUNTERSTATEMENT OF THE CASE

In January 1986, petitioner Crysen/Montenay Energy Company ("Crysen") contracted with Scallop for the sale of 300,000 barrels of fuel oil. The contract provided for any disputes arising thereunder to be submitted to arbitration before the American Arbitration Association. When the oil was delivered, it did not conform to the specifications of the contract and, therefore, disputes arose.

In June 1986, Crysen filed a petition for relief under Chapter 11 of Title 11 of the United States Code. In March 1987, Crysen commenced an adversary proceeding against Scallop. Scallop immediately asserted an affirmative defense based upon the agreement to arbitrate and promptly moved to compel arbitration, which motion was initially denied on May 29, 1987. As a result, the parties proceeded with the pending litigation. Shell was added to the litigation after it assumed Scallop's liabilities upon Scallop's dissolution.[1]

Subsequently, due to a change in the law, it became clear that the standards the bankruptcy court had applied in denying the initial motion to compel arbitration were incorrect, and Shell renewed the motion before the bankruptcy court to stay the adversary proceeding and compel arbitration.[2] Shell's motion was granted by order entered on

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[1] For ease of reference Shell and Scallop will collectively be referred to herein as "Shell."

[2] By that time, the bankruptcy court had held that the adversary proceeding constituted a "non-core" proceeding.

November 20, 1995. The parties proceeded to arbitration, which consisted of a pre-hearing conference, pre- and post-hearing briefs, five days of witness testimony and a half day of closing arguments and questions to counsel by the panel of arbitrators. In addition, deposition testimony was designated and cross-designated by the parties and numerous documents were admitted into evidence. In short, a full and fair hearing was conducted by the arbitrators.

The three-member panel of arbitrators (the "Panel") issued an Award of Arbitrators (the "Award") unanimously denying Crysen's claims in their entirety. Shell moved before the bankruptcy court to confirm the Award and for summary judgment dismissing the adversary proceeding. Crysen cross-moved to vacate the Award. In support of the motion and cross-motion, the parties submitted portions of the transcript of the arbitration hearing, as well as certain of the exhibits which had been relied upon, and made the entire transcript of the arbitration proceeding available to the bankruptcy court. After reviewing the evidence presented to the arbitrators by both Shell and Crysen, the bankruptcy judge issued proposed findings of fact and conclusions of law (the "Proposed Findings") recommending that the Award be confirmed and that the adversary proceeding be dismissed. Pet. App. A51.

Crysen filed Objections to the Proposed Findings, arguing that: (i) the Bankruptcy Court lacked the power to issue an order compelling arbitration; (ii) Shell waived its right to arbitration; (iii) the Panel's Award was in "manifest disregard of the law"; and (iv) the Panel committed misconduct by refusing to hear evidence pertinent and material to the controversy.[3] The district court conducted a *de novo* review of the matters raised by the Objections. Based on the

[3] Crysen has not included in the Petition its claims that Shell waived its right to seek arbitration, that the Panel acted in manifest disregard of the law, or that the Panel committed misconduct.

evidence presented by the parties, the district court rejected each of Crysen's Objections in turn.

Crysen then appealed to the United States Court of Appeals for the Second Circuit, arguing that: (i) Shell waived its right to arbitrate; (ii) the bankruptcy court lacked the power to order arbitration; and (iii) the district court's *de novo* review of the bankruptcy court's decision was unconstitutional. The Second Circuit rejected Crysen's arguments and affirmed the decision of the district court in its entirety.

REASONS FOR DENYING THE PETITION

The Petition should be denied because it does not raise any compelling issues for resolution by this Court. The Second Circuit's decision that a bankruptcy court has the authority to stay a non-core proceeding and compel arbitration does not conflict with the decision of any other United States Court of Appeals. Similarly, the Second Circuit's decision does not depart from "the accepted and usual course of judicial proceedings,"[4] as bankruptcy courts routinely stay proceedings in favor of arbitration, and Crysen has not cited a single court decision to the contrary. Moreover, the question of whether a bankruptcy court has the authority to stay actions and compel arbitration does not raise any unresolved issue of federal law that must be resolved by this Court. Although Crysen argues that no court has "intelligibly" resolved the question, Pet. at 5, the Second Circuit's decision is well reasoned and completely consistent with federal law.

The second question raised by Crysen is similarly unworthy of review. Crysen argues that 28 U.S.C. § 157 and Article III of the Constitution require that the standard of review imposed upon a bankruptcy court examining an arbitrator's award should be greater than that for a district court. In addition, Crysen contends that the bankruptcy court must impose new and different rules upon the arbitrators in

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[4] Sup. Ct. R. 10(a).

conducting the hearing and rendering the award. Crysen's effort to create a strawman, and then knock it down, fails. Thus, the law is clear that, in a non-core case in which it is to issue proposed findings of fact and conclusions of law, a bankruptcy court must review an arbitrator's award under the same standard as would the district court—that is, under the standards set forth by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), and by relevant caselaw. Again, there is no conflict among the Courts of Appeals on this point, the decision below does not depart from the accepted and usual course of judicial proceedings, nor does this case raise an unresolved issue of federal law. For these reasons, the Petition should be denied.

I. BANKRUPTCY COURTS HAVE THE POWER TO STAY NON-CORE PROCEEDINGS AND COMPEL ARBITRATION

Bankruptcy courts routinely stay proceedings in favor of arbitration in both core and non-core proceedings.[5] Their ability to do so need not be grounded in § 3 of the FAA, as Crysen would have the Court believe, but rather in the grant of power under 28 U.S.C. §157 and 11 U.S.C. § 105(a). Indeed, the FAA could not be a *source* of the bankruptcy court's power, as FAA § 3 does not contain a *grant* of power at all, but rather *withdraws* power from the courts by revoking their discretion to hear disputes which the parties previously agreed to arbitrate. *See Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 684 (1996); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). Moreover, like all courts, bankruptcy courts have the power to stay actions before them

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[5] The district court cited numerous cases in which bankruptcy courts had ordered arbitration. Pet. App. A29. Likewise, a leading commentator has observed that "[t]he bankruptcy courts have the power to compel arbitration under a valid arbitration clause unless it can be demonstrated that enforcement of the arbitration clause would be contrary to the provisions or purpose of the Bankruptcy Code." W. Norton, 1 *Norton Bankruptcy Law and Practice* (2d ed. 1995) § 4:47A (Supp. 1997).

as part of their inherent power to control matters on their dockets. *See Landis v. North American Co.*, 299 U.S. 248, 254 (1936). The Second Circuit was therefore correct to hold that a bankruptcy court not only has the power to stay a non-core proceeding and compel arbitration, but that it generally does not have discretion to do otherwise. Because the Second Circuit correctly decided this issue in conformity with federal law and practice, the Petition should be denied.

A. Bankruptcy Courts Have The Power To Stay Non-Core Actions And Compel Arbitration By Virtue Of Their Inherent Power And The Power Referred By The District Courts

There is no dispute that a district court has the power to stay an action, as such power is within the court's inherent power "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis*, 299 U.S. at 254. Moreover, district courts have the inherent power to compel parties to arbitrate disputes. *See, e.g., Gavlik Constr. Co. v. H.F. Campbell Co.*, 526 F.2d 777 (3d Cir. 1975), *overruled on other grounds, Zosky v. Boyer*, 856 F.2d 554 (3d Cir. 1988). Crysen has cited no authority to demonstrate that bankruptcy courts do not have the same inherent power. Moreover, bankruptcy courts have specifically been granted such power by virtue of the district courts' referral of power under 28 U.S.C. § 157(a), by their status as "units" of the district courts pursuant to 28 U.S.C. § 151, and by the broad grant of authority from Congress in § 105(a) of the Bankruptcy Code.[6]

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[6] Crysen argues, in a footnote, that the bankruptcy court's inherent power cannot apply to stays in connection with arbitration, because doing so would render FAA §§ 3 and 4 "superfluous." Pet. App. 7, n.4. A court's power to stay proceedings is discretionary, however, while the FAA makes such stays mandatory. Thus, the FAA is not superfluous, but rather imposes an important restriction on a court's discretion to issue a stay.

The district courts are granted original jurisdiction of all civil proceedings arising under Title 11 and of proceedings arising in or related to cases under Title 11. 28 U.S.C. § 1334(b). Pursuant to 28 U.S.C. § 157(a), the district court may refer these proceedings to the bankruptcy court, which is a "unit" of the district court. 28 U.S.C. § 151.

Both the power to stay actions and the power to compel arbitration are included within the authority delegated to bankruptcy courts pursuant to 28 U.S.C. § 157(a). Moreover, pursuant to 11 U.S.C. § 105(a), bankruptcy courts are granted broad equitable powers to issue "any order, process or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." As this Court has held, "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate." *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995). No authority exists to indicate that Congress intended bankruptcy courts to be deprived of the power to compel arbitration, and enforcing private agreements to arbitrate is in no way inconsistent with the purposes of the Bankruptcy Code, especially in a non-core case. *See Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith*, 885 F.2d 1149, 1157-61 (3d Cir. 1989).

Locating such power in the bankruptcy courts does not run afoul of either 28 U.S.C. § 157(c) or Article III, as Crysen contends. In order to address the constitutional concerns of having a non-Article III court determine matters of state law, § 157(c) mandates that, in non-core cases, a bankruptcy court cannot enter a final order or judgment in such cases, but rather must make proposed findings of fact and conclusions of law to the district court, which must undertake a *de novo* review of all matters to which objections are raised before entering the final order or judgment. An order staying an action and compelling arbitration is not a final order or judgment, and, therefore, is within the authority granted to

bankruptcy courts. A district court's *de novo* review will encompass the bankruptcy court's decision to compel arbitration, as it did in this case. Thus, as the district court held in this case, because the final power to determine whether a dispute should have been arbitrated and whether the arbitration award should be confirmed rests with the district court, "the bankruptcy judge's enforcement of an arbitration clause under these circumstances does not even indirectly run afoul of 28 U.S.C. § 157(c)(1) . . . [or] offend the teaching of *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982)." Pet. App. A29.

Indeed, it should be noted that questions concerning the arbitrability of a dispute do not need to be determined before the arbitration occurs—it is enough that a court with the power to determine arbitrability has the opportunity to do so before the award is confirmed. *See National Ass'n of Broadcast Employees & Technicians v. American Broadcasting Co., Inc.*, 140 F.3d 459, 462 (2d Cir. 1998), *cert. denied*, 525 U.S. 1069 (1999). Accordingly, even if the bankruptcy court in this case was not empowered to compel arbitration, the district court's subsequent ruling that the case was properly sent to arbitration moots any argument that the bankruptcy court lacked the power to do so.

Thus, for this reason alone, the bankruptcy court's decision to stay the action and compel arbitration was proper, and the Petition should be denied.

B. Bankruptcy Courts Are "Courts of the United States" As Used In The FAA

Even if the bankruptcy court's power to order arbitration depends in some way on the FAA, interpreting FAA § 3 to apply to bankruptcy courts as well as district courts is the only reasonable reading of the statute.[7]

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[7] Crysen's argument, that the definition of "courts of the United States" in FAA § 3 is governed by the definition of that phrase contained in 28

This Court has held that, " 'in all cases of statutory construction, our task is to interpret the words [of the statute] in light of the purposes Congress sought to serve.' " *Sutton v. United Air Lines*, 527 U.S. 471, 496 (1999) (citing *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979)). Congress enacted the FAA to ensure that arbitration agreements were enforced by the courts, in effect overruling prior court practice of hearing contract cases despite the existence of a valid arbitration clause. *See Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985) (citing H.R. Rep. No. 96, 68th Cong., 1st Sess., 1-2 (1924)). By making arbitration mandatory, the FAA effectively withdraws a court's power to hear such cases. Congress could not have intended district courts to be bound by the FAA's mandate to compel arbitration, while leaving bankruptcy courts free to act otherwise. Indeed, as bankruptcy courts derive their power from the district courts and cannot constitutionally exercise greater power than the district courts, *see Northern Pipeline*, 458 U.S. 50, it would be an unconstitutional interpretation of the FAA to permit bankruptcy courts the power to hear cases which district courts cannot. Thus, the FAA should not be interpreted to reach such a result. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 120 S. Ct. 1858, 1870 (2000). As the Petition advocates the adoption of such an interpretation of the FAA, the Petition should be denied for this reason as well.

U.S.C. § 451, is incorrect and not supported by any authority. Pet. at 6-8. Section 451, by its terms, only applies to the use of that phrase in Title 28, not in Title 9, where the FAA is contained. The cases cited by Crysen are similarly inapplicable, as those cases also rely on the language of § 451 to hold that bankruptcy courts are not "courts of the United States" in cases not involving the FAA.

II. THE ARBITRATORS' AWARD WAS PROPERLY RENDERED AND REVIEWED

Although Crysen's reasoning is less than clear, it appears to be asking this Court to re-write the rules that govern the administration of arbitration proceedings and the review of arbitration awards when those awards are to be reviewed in the first instance by a bankruptcy court rather than by a district court. In effect, Crysen argues that the bankruptcy court in this case should have ordered the arbitration to take place under rules other than those to which the parties agreed, and that the bankruptcy court should have reviewed the Award *de novo*, rather than under the standards set forth in FAA §§ 9 and 10 and the controlling caselaw.[8] Crysen's argument is contrary to established federal law. Accordingly, the Petition should be denied.

An arbitrator's award may be vacated only if the award was procured by fraud, the arbitrators were partial or corrupted, the arbitrators were guilty of misconduct, the arbitrators exceeded their powers, or the arbitrators otherwise acted in "manifest disregard of the law." *See* FAA § 10; *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 939 (1995). Contrary to Crysen's contention, nothing in 28 U.S.C. § 157(c) or Article III requires a court to undertake a *de novo* review of an award just because the first court to review the award is a bankruptcy court rather than a district court.

Section 157(c) was enacted in response to the constitutional limitations placed on the power of the bankruptcy courts in non-core cases by *Northern Pipeline*. It thus requires that the district court undertake a *de novo* review of a bankruptcy court's proposed findings of fact and

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[8] Although it does not say so directly, Crysen can mean nothing else when it argues that the bankruptcy court "was in error to conduct the confirmation proceeding like a district court under FAA §§ 9 and 10." Pet. at 12.

conclusions of law before a final order can be issued. The district court will then confirm the award so long as the arbitrators did not act in the manner set forth in FAA § 10 or in manifest disregard of the law. The purpose of this *de novo* review is to permit the parties to have a district court hear their case as if it had not been referred to bankruptcy court.[9] Thus, there is no basis upon which to find that the bankruptcy court must use a standard other than that used by the district court.

The standard of review required of district courts also conforms to the purposes of the FAA to enforce arbitration agreements and to obtain a rapid resolution with a minimum of judicial interference.[10] In accordance with these purposes, arbitrators are generally not required to keep transcripts of proceedings or set forth the reasons for their decision in writing. In this case, for example, the parties had agreed to arbitrate pursuant to the rules of the American Arbitration Association, which do not require the arbitrators to either create a record or set forth the reasons for their award.[11] While Crysen contends that the bankruptcy court must instruct the arbitrators to keep such a record in order to comply with its responsibilities under § 157(c), it offers no authority or justification for its position.

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[9] Indeed, the very purpose of a *de novo* hearing is to "try[] [the] matter anew the same as if it had not been heard before and as if no decision had been previously rendered." *Black's Law Dictionary* 721 (6th ed. 1990).

[10] *See Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 280 (1995) (citing House of Representatives Report stating that arbitration is, among other things, cheaper and faster than litigation); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) ("unmistakably clear congressional purpose" of FAA is that arbitration "be speedy and not subject to delay and obstruction in the courts").

[11] In this case, however, the parties did have a transcript of the arbitration proceeding, relevant portions of which are part of the record below.

In this case, both the bankruptcy court and the district court, respectively, properly reviewed the Award. They each did so after reviewing the record and the extensive evidence cited to by both parties. Thus, the district court properly adopted the bankruptcy court's Proposed Findings after a *de novo* review consistent with the dictates of FAA § 10 and controlling caselaw.

Simply put, no reason exists to subject arbitration awards rendered on referral from a bankruptcy court to a different procedure and standard of review than arbitration awards rendered after referral from a district court, and Crysen has cited no authority to support such a radical change in the law. Such a result is grounded neither in the requirements of § 157 nor the Constitution, is contrary to the very purposes of arbitration, and should be rejected.

CONCLUSION

For the reasons set forth above, the Petition should be denied.

Respectfully submitted,

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STATUTORY APPENDIX

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Title 28, Section 157(a) of the United States Code provides in pertinent part:

> (a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

Title 11, Section 105 of the United States Code provides in pertinent part:

> (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.